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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

WILLIAM ANDERSON,

Plaintiff and Appellant,

v.

VISTA PIONEERS I, INC.,

Defendant and Respondent.

D051517

(Super. Ct. No. GIN055282)

APPEAL from a judgment of the Superior Court of San Diego County, Jacqueline M. Stern, Judge. Affirmed in part, reversed in part and remanded.

Representing himself in propria persona, William Anderson appeals from the trial court's dismissal of Vista Pioneers I, Inc. (VPI) from this action following the trial court's rulings on VPI's demurrers. As we will explain, we conclude that the trial court properly sustained VPI's demurrers to all of the causes of action pled against it, but that the trial court abused its discretion in denying leave to amend with respect to the cause of action for negligence in the first amended complaint in this action. Accordingly, we reverse the

trial court's ruling on that issue and we remand this action for proceedings consistent with this opinion.

I

FACTUAL AND PROCEDURAL BACKGROUND

A. *Anderson's Disputes with VPI*

According to Anderson's pleadings, he is a senior citizen who has lived at Vista Village Mobile Home Park since 1988. Anderson's pleadings state that the mobilehome park is owned and operated by VPI as a nonprofit mutual benefit corporation. Anderson alleged he became a member of VPI as a result of entering into a rental agreement with VPI and making an initial capital investment.

In September 2006, Anderson filed this lawsuit against VPI; its board president, John Larocque; and its attorney, David Semelsberger (collectively, Defendants) followed shortly thereafter by a first amended complaint. In the first amended complaint, Anderson alleged that beginning "[o]n or about" January 1990, he began writing letters to VPI's board of directors expressing his concerns about the inaccuracy of VPI's financial statements. Anderson explains that in 1999 he also started to complain about the content of VPI's tax returns. According to Anderson, as a result of improper tax filings and improper designation of itself as a "'stock cooperative,'" VPI lost \$103,000 in tax credits, paid tax that was not owed, and filed flawed tax returns for the years 1999 through 2005.

Anderson alleged he met with Larocque and VPI's CPA, Gary Lloyd, in 1999 to warn about the inaccurate financial statements, but VPI declined to make any changes. Anderson claims that in 1999, he filed a complaint about Lloyd with the California Board

of Accountancy, and that as a result Lloyd had his license revoked in 2002. According to Anderson, beginning in 2000, he "started to utilize California's public agencies such as the Attorney General's Office, the district attorney's office and other relevant state regulatory agencies in an effort to monitor" VPI's alleged misconduct.

Anderson alleged that in March 2001, VPI threatened to terminate his membership unless he signed a "Cease and Desist Stipulation" in which he would agree (1) to stop making complaints against VPI's accountants, and (2) to refrain from contacting the Attorney General, district attorney or other agencies about the actions of VPI's board in operating Vista Village. Anderson signed the Cease and Desist Stipulation but then informed VPI in July 2002 that he would no longer comply with it.

According to Anderson, the VPI board held a hearing in October 2002 at which it decided to suspend Anderson's membership for six months with the condition that he reimburse VPI in the amount of \$8,930 for its expenses and costs and that during the suspension he refrain from making complaints about the VPI board's actions. Anderson claims that as a result of the suspension he was deprived of his right to vote in corporate elections, and a lien was placed on his membership in the amount of \$8,930. In September 2003, VPI allegedly informed Anderson that it would continue the membership suspension until he paid the \$8,930.

B. *Anderson Files a First Lawsuit Against VPI*

As Anderson explained in the first amended complaint, he then filed a lawsuit against VPI. Specifically, Anderson filed a petition for writ of mandate against VPI in October 2003 in the Superior Court of San Diego County, Case No. GIN033455

(*Anderson I*) seeking relief from the suspension of his membership. After having lost the services of his attorney, Anderson filed a first amended complaint in June 2004, representing himself in propria persona. In the first amended complaint, Anderson complained about VPI's inaccurate tax filings and financial statements and added another defendant (Larocque).

After Anderson again retained counsel, he filed a second amended complaint in *Anderson I*, adding a third defendant (another CPA retained by VPI) and alleging causes of action against VPI and the other defendants for breach of fiduciary duty, violation of several sections of the Corporations Code and declaratory relief. The trial court in *Anderson I* sustained demurrers filed by the defendants, granting leave to amend with respect to some of the causes of action. After Anderson did not timely file an amended complaint, the only surviving claim was the declaratory relief cause of action against VPI. Anderson then voluntarily dismissed that remaining cause of action in April 2006.¹

C. *Anderson Files this Action*

The pleadings in this action — filed in September 2006 — updated the status of the dispute between Anderson and VPI. Anderson explained that in April 2006, the VPI board voluntarily lifted the suspension of his membership and lifted the \$8,930 lien. Anderson also alleged that although "VPI had attempted to unilaterally modify" his and

¹ In this appeal, Anderson has filed an unopposed request for judicial notice of certain documents from the superior court file in *Anderson I*. In addition, VPI has filed an unopposed request for judicial notice of an additional document from that file. We conclude that all of the subject documents may be properly noticed under Evidence Code sections 452 and 459, and we therefore grant both of the requests for judicial notice.

other members' occupancy rental agreements "and insert one-sided conditions which would allow VPI to review each members' [*sic*] membership status every five years," the VPI board had now "retreated from its original position."

The first amended complaint asserted causes of action against all Defendants for (1) negligence; (2) violation of Civil Code section 1708;² (3) violation of Civil Code section 52.1;³ (4) intentional infliction of emotional distress; (5) breach of contract; and (6) breach of the implied covenant of good faith and fair dealing.⁴ Anderson alleged that Defendants had ignored his concerns about the management of VPI, that they allegedly attempted to silence him by "illegal, coercive, and retaliatory means," including infringing on his right to free speech, and that they breached a 1989 rental agreement

² Civil Code section 1708 provides: "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights."

³ Civil Code section 52.1 provides in relevant part: "(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured."

⁴ The causes of action for negligence, violation of Civil Code section 1708, violation of Civil Code section 52.1 and intentional infliction of emotional distress also included allegations that Defendants entered into a continuing conspiracy with respect to their allegedly wrongful conduct. Anderson alleged that the last overt act of the conspiracy was in April 2006 when VPI restored Anderson's membership and lifted the \$8,930 lien.

between VPI and Anderson by suspending Anderson's membership rights and placing a lien on his membership.

D. *VPI's Demurrer to the First Amended Complaint*

VPI demurred to the first amended complaint. Among other things, VPI argued (1) the claims against it were barred by the previous litigation of *Anderson I*; (2) each of Anderson's causes of action were barred by the statute of limitations; (3) Civil Code section 1708 did not give rise to a cause of action; and (4) Anderson did not adequately plead the causes of action for breach of contract, breach of the covenant of good faith and fair dealing, and intentional infliction of emotional distress.

The trial court sustained VPI's demurrer to the first amended complaint. It ruled that the statute of limitations barred Anderson's causes of action for negligence, violation of Civil Code section 1708, violation of Civil Code section 52.1, and intentional infliction of emotional distress. The trial court also sustained VPI's demurrer to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing on the ground that Anderson had not adequately pled the terms of the contract. However, the trial court gave Anderson leave to amend those two causes of action. The trial court rejected VPI's argument that the rulings in *Anderson I* barred Anderson from pursuing his claims against VPI in this action.

Larocque and Semelsberger also filed demurrers, which the trial court sustained without leave to amend. The trial court dismissed both Larocque and Semelsberger from the action, and Anderson did not file an appeal from those dismissals.

E. *VPI's Demurrer to the Second Amended Complaint*

Anderson then filed a second amended complaint, which contained only two causes of action — breach of contract and breach of the covenant of good faith and fair dealing against VPI. The second amended complaint attached a copy of the first, seventh and ninth pages of a rental agreement between Anderson and VPI dated January 1, 1989 (the Rental Agreement). The text of the complaint explained that Anderson was able to locate only three pages of the Rental Agreement. Anderson admitted that he did not know the exact content of the missing pages of the Rental Agreement. "[Anderson] does not possess the missing pages of the Rental Agreement and as a result does not know the exact details of what is contained in those pages. However, [Anderson] alleges on information and belief that the missing pages require Defendant VPI to abide by the terms of the Corporation's Bylaws." The second amended complaint also attached a copy of Anderson's certificate of membership in VPI dated October 24, 1994 (Certificate of Membership), which Anderson alleged was part of his contractual relationship with VPI.

In the first cause of action, for breach of contract, Anderson alleged that "[d]espite a contractual entitlement to full VPI membership including the right to vote, [his] right to vote was suspended without any lawful justification . . ."; that "VPI directly breached its obligations to [him] under the Rental Agreement by unlawfully suspending [his] membership rights"; and that "VPI also breached the Rental Agreement by placing a lien on [his] membership" Anderson also alleged that "[t]he Certificate of Membership . . . is . . . an instrument in writing evidencing a contractual relationship . . . entitling

[him] to be a member of VPI with all the rights and privileges of such membership including the right to vote at VPI elections."

In the second cause of action, Anderson alleged that VPI breached the implied covenant of good faith and fair dealing in both the Rental Agreement and the Certificate of Membership by suspending his membership and imposing a lien because his "entitlement to a membership interest at VPI free from any encumbrances is an express and implied covenant of both the Rental Agreement and the Certificate of Membership."

VPI demurred to the second amended complaint because Anderson had not adequately pled the terms of the contract on which he based his causes of action. VPI also argued that because Anderson could have raised the same claims in *Anderson I*, the court should terminate this action "based upon public policy."

The trial court sustained the demurrer. It ruled that both causes of action failed because the second amended complaint did not allege the essential terms of the contract. The trial court explained that Anderson could not "simply attach part of the written contract and allege it was breached without pleading its material terms." Further, as to the cause of action for breach of the covenant of good faith and fair dealing, the trial court ruled that because the second amended complaint did not set forth the essential terms of the contract, Anderson had "not identified what 'benefits of the agreement' he was deprived of by [VPI]'s conduct."

The trial court entered a dismissal in favor of VPI on May 30, 2007, but the dismissal was not served on Anderson until June 18, 2007. On June 4, 2007, acting for the first time in propria persona during this action, Anderson filed a motion for

reconsideration. On August 10, 2007, the trial court took the motion for reconsideration off calendar after concluding that it lacked jurisdiction due to the fact that it had already entered an order of dismissal.

On August 16, 2007, Anderson timely filed this appeal of the trial court's dismissal of VPI.

II

DISCUSSION

A. *Standard of Review*

"On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law.'" (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) "A judgment of dismissal after a demurrer has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground." (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324 (*Carman*).) In reviewing the complaint, "we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable." (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) "If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38.) In conducting a de novo review of whether the facts pled in the complaint state a claim, we are limited by the principle that "[i]ssues not

raised in an appellant's brief are deemed waived or abandoned." (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.) "This court is not required to discuss or consider points which are not argued or which are not supported by citation to authorities or the record.'" (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.)

Further, "[i]f the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. . . . If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. . . . The plaintiff has the burden of proving that an amendment would cure the defect." (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081, citations omitted.) "[S]uch a showing can be made for the first time to the reviewing court." (*Smith v. State Farm Mutual Automobile Ins. Co.* (2001) 93 Cal.App.4th 700, 711.)

B. *The Trial Court Properly Ruled that Anderson I Did Not Bar the Claims Against VPI Presented in this Action*

We first address VPI's argument that the proceedings in *Anderson I* bar the claims alleged in this lawsuit.

VPI does not base its argument on the doctrine of res judicata. Indeed, as VPI implicitly recognizes, it cannot rely on that doctrine because no final judgment was entered in *Anderson I* with respect to the claims against VPI. (See *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897 ["'Res judicata' describes the preclusive effect of a final judgment on the merits. . . . Under the doctrine of res judicata, if a

plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action" (fn. & citations omitted)].)

VPI relies instead on *Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 (*Ricard*). In *Ricard*, the plaintiff tried unsuccessfully in a first lawsuit to obtain leave to amend to add a specific cause of action. While the first lawsuit was still pending, the plaintiff then filed a second lawsuit limited to the cause of action that the trial court had not permitted to be added in the first lawsuit. *Ricard* affirmed the trial court's order sustaining a demurrer in the second lawsuit. After observing that the plaintiff had acknowledged "that the present suit was filed solely to circumvent the court's prior adverse ruling," *Ricard* affirmed the ruling on the principle that "[a] trial court has authority to strike sham pleadings, or those not filed in conformity with its prior ruling." (*Id.* at p. 162.)

We conclude that *Ricard* is not applicable here. The causes of action pled in this lawsuit against VPI were not disallowed by the trial court in *Anderson I*. Specifically, the trial court in *Anderson I* sustained without leave to amend Anderson's causes of action against VPI for violation of Corporations Code sections 8813, 7411, 7236 and 7412, and sustained the demurrer to the cause of action for breach of fiduciary duty with leave to amend. None of those claims are at issue here. Accordingly, *Ricard* does not apply, and the proceedings in *Anderson I* do not provide a basis for sustaining a demurrer in favor of VPI.

C. *The Demurrer to the Causes of Action for Negligence, Violation of Civil Code Section 1708, Violation of Civil Code Section 52.1 and Intentional Infliction of Emotional Distress*

Anderson argues that the trial court erred in sustaining the demurrer against the first amended complaint's causes of action for negligence, violation of Civil Code section 1708, violation of Civil Code section 52.1 and intentional infliction of emotional distress in the first amended complaint.

1. *Civil Code Section 1708 Does Not Give Rise to a Cause of Action for Damages*

The trial court sustained the demurrer to the four causes of action at issue here by deciding that they were all barred by the statute of limitations. However, before analyzing whether the statute of limitations bars those causes of action, we first discuss a separate dispositive ground for affirming the trial court's demurrer to the cause of action for violation of Civil Code section 1708.

Civil Code section 1708 provides: "Every person is bound, without contract, to abstain from injuring the person or property of another, or infringing upon any of his or her rights." As VPI argued in the trial court and again on appeal, this provision does not give rise to a cause of action for damages.

VPI is correct. Case law establishes that a plaintiff may not base a cause of action for damages on Civil Code section 1708. (*Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 328; *Ley v. State of California* (2004) 114 Cal.App.4th 1297, 1306.) Here, because Anderson's cause of action sought damages based on an alleged violation of Civil Code section 1708, but such a cause of action is not permitted,

we conclude that the trial court properly sustained the demurrer to the cause of action for violation of Civil Code section 1708 without leave to amend.⁵

2. *Application of the Statute of Limitations to the Causes of Action for Negligence, Violation of Civil Code Section 52.1 and Intentional Infliction of Emotional Distress*

We next consider whether the trial court erred in ruling that the causes of action for negligence, violation of Civil Code section 52.1 and intentional infliction of emotional distress are barred by the statute of limitations.

We first determine which limitations periods are applicable to each of the three causes of action. The parties do not dispute that the causes of action for negligence and intentional infliction of emotional distress, as pled in the first amended complaint, are types of personal injury claims. Thus, they are subject to the two-year limitations period for personal injury claims set forth in Code of Civil Procedure section 335.1. Case law establishes that a cause of action for violation of Civil Code section 52.1 is also subject to the two-year limitations period for personal injury actions. (See *West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 953 [the statute of limitations for personal injury actions — which at that time was one year, but is now two years — applied to Civ. Code, § 52.1]; *Gatto v. County of Sonoma* (2002)

⁵ As we have explained, we may affirm an order sustaining a demurrer if proper on any ground stated in the demurrer, even if the trial court did not premise its ruling on that ground. (*Carman, supra*, 31 Cal.3d at p. 324.) We note that although the trial court did not reach the issue of whether the cause of action against VPI for violation of Civil Code section 1708 was subject to demurrer on the ground that the statute does not give rise to a cause of action for damages, it did make that ruling with respect to Larocque's demurrer to the same cause of action.

98 Cal.App.4th 744, 760 [claim under Civ. Code, § 52.1 alleging violation of the right to free speech was subject to the limitations period for personal injuries].)

To decide whether the two-year statute of limitations bars the relevant causes of action, we apply the rule that "statutes of limitation do not begin to run until a cause of action accrues. [Citation.] [¶] Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.'" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806 (*Fox*).)⁶ Thus, we focus our analysis on the date on which the cause of action was complete with all of its elements. To conduct this analysis we must focus on the facts that Anderson alleges gave rise to each of the causes of action at issue.

a. *Negligence*

i. *The trial court properly sustained the demurrer to the negligence cause of action*

We first consider the cause of action for negligence. The cause of action for negligence alleges that VPI breached its duty of care "[b]y failing to heed [Anderson's] legitimate concerns about the management and operation of VPI, and by directly attempting to silence [Anderson] by illegal, coercive, and retaliatory means" Thus in analyzing whether the statute of limitations bars the negligence cause of action, we

⁶ "An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Fox, supra*, 35 Cal.4th at p. 807.) Anderson has not argued that the discovery rule is pertinent in this case.

focus on the time period, as alleged in the first amended complaint, on which (1) VPI failed to heed Anderson's concerns and (2) VPI attempted to silence Anderson.

The first amended complaint contains several allegations about the time period in which VPI failed to heed Anderson's concerns about its management and operations. Anderson's unheeded complaints began in 1990. According to the first amended complaint, the last time Anderson expressed his concerns to VPI was in June 2002 when he told VPI that the license of CPA Gary Lloyd had been revoked.

The first amended complaint also contains several allegations concerning VPI's attempts to silence Anderson. Specifically, Anderson alleges that VPI attempted to silence him (1) when it required him to sign the Cease and Desist Stipulation in 2001; (2) when it suspended his membership in October 31, 2002; and (3) when it informed him in September 2003 that the suspension would continue. The first amended complaint does not allege any attempts to silence Anderson after September 2003.

This action was filed in September 2006, which is more than two years after the last date that Anderson expressed his unheeded concerns to VPI (June 2002) and the last date that VPI attempted to silence Anderson (September 2003). Thus, the two-year statute of limitations bars the cause of action for negligence as pled in the first amended complaint.

In an attempt to overcome the statute of limitations bar for all of the causes of action at issue here, Anderson points to the conspiracy allegations in first amended complaint. Anderson relies on the rule that "when a civil conspiracy is properly alleged and proved, the statute of limitations does not begin to run on any part of a plaintiff's

claims until the 'last overt act' pursuant to the conspiracy has been completed." (*Wyatt v. Union Mortgage Co.* (1979) 24 Cal.3d 773, 786; see also *People v. Zamora* (1976) 18 Cal.3d 538, 548 ["It has long been the rule in conspiracy cases that a limitation period begins to run from the time of the last overt act committed in furtherance of the conspiracy"].) He argues that the last overt act of the conspiracy occurred in April 2006 when VPI lifted both the suspension of his membership and the \$8,930 lien.

We reject Anderson's argument. As described in the first amended complaint, the most recent *act* by Defendants that allegedly caused harm to Anderson was in September 2003 when VPI notified Anderson that the suspension of his membership would continue until he paid the amount of \$8,930. "The term 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy." (CALJIC No. 6.10.) As described in the first amended complaint, April 2006 is merely the date on which the injurious effects of the alleged conspiracy were lifted. The first amended complaint does not point to any date after September 2003 on which an act was done in furtherance of the conspiracy.⁷

⁷ In the trial court, Anderson also opposed VPI's statute of limitations argument by contending that VPI was equitably estopped from relying on the statute of limitations and that the doctrine of equitable tolling applied. Anderson did not raise either of those arguments in his opening appellate brief, and we thus consider them waived. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25 [an appellate court has the discretion to deem an alleged error to have been waived if not asserted in the opening brief].)

Anderson also argues that his cause of action for negligence is not barred by the statute of limitations because VPI committed "*repeated* acts of negligence" when "each year they knowingly prepared false financial statements and knowingly filed false federal tax returns." He claims that this conduct last occurred in October 2007.⁸ Anderson cannot rely on this argument to overcome the statute of limitations bar because the facts on which he relies — that VPI negligently prepared its financial statements and tax returns in *recent* years — was not expressly pled as a basis for the negligence cause of action. Therefore, we conclude that the trial court properly sustained the demurrer to the negligence cause of action.

- ii. *The trial court abused its discretion by not granting leave to amend the negligence cause of action*

A separate issue is whether the trial court erred in sustaining the demurrer to the negligence cause of action without granting leave to amend. Anderson argues that the trial court should have granted him leave to amend to cure the deficiencies in the first amended complaint. Although Anderson requested leave to amend from the trial court in response to VPI's demurrer, he did not specifically request leave to amend to allege that VPI committed repeated acts of negligence in filing its tax returns and financial statements through 2007.

⁸ We note that Anderson's opening appellate brief was written in April 2008, and Anderson might now contend that VPI has since prepared additional improper tax returns or financial statements.

We may nevertheless consider on appeal whether the trial court abused its discretion in sustaining the demurrer without leave to amend. Code of Civil Procedure section 472c, subdivision (a) states that "[w]hen any court makes an order sustaining a demurrer without leave to amend the question as to whether or not such court abused its discretion in making such an order is open on appeal *even though no request to amend such pleading was made.*" (Italics added.) Thus, "[e]ven where there is no request for leave to amend (or where, as here, the only arguable request was wholly insufficient to suggest whether or how the plaintiff could amend) 'the question as to whether or not [the trial] court abused its discretion' in denying leave to amend remains open on appeal." (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542 (*CAMSI IV*).) On appeal, the "[p]laintiff must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading." (*Palm Springs Tennis Club v. Rangel* (1999) 73 Cal.App.4th 1, 7-8.) Our inquiry is whether Anderson has shown that "there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967.)⁹

⁹ We note that "[g]enerally, failure to raise an issue or argument in the trial court *waives* the point on appeal," and "[a] persuasive argument can be made that a similar rule should govern where a party doesn't ask the trial court for leave to amend. . . . However, the Legislature in Code of Civil Procedure section 472c, subdivision (a) enacted the contrary rule, and we are bound by it." (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 412.)

Here, the defect identified by VPI's demurrer was that that negligence cause of action was barred by the two-year statute of limitations. Anderson argues on appeal that he can overcome that defect by pleading that VPI was negligent through October 2007 in the filing of its tax returns and preparation of its financial statements. We conclude that there is a reasonable probability that the defect identified by VPI would be cured by a cause of action for negligence based solely upon conduct by VPI that took place no earlier than September 5, 2004, which is two years before this action was filed. "When an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period." (*Hogar Dulce Hogar v. Community Development Commission* (2003) 110 Cal.App.4th 1288, 1295.) Each improper tax filing or issuance of a financial statement is a wrongful act that triggers a new limitations period for that specific wrongful act, and thus there is a reasonable probability that a negligence cause of action focusing only on financial mismanagement after September 5, 2004, will not be barred by the statute of limitations.

In determining whether the trial court abused its discretion in not granting leave to amend, we will find an abuse of discretion "absent an effective request for leave to amend in specified ways, only if a potentially effective amendment were both apparent and consistent with the plaintiff's theory of the case." (*CAMSI IV, supra*, 230 Cal.App.3d at p. 1542.) We conclude that an amended pleading alleging that VPI acted negligently in filing tax returns and preparing financial statements in the time period after September 5, 2004, was both apparent and consistent with Anderson's theory of the case. As pled in the first amended complaint, the negligence cause of action focused on two

main threads: (1) VPI was negligent because it suspended Anderson's membership; and (2) VPI was negligent because it failed to heed Anderson's warnings about its management and operations. The first amended complaint also alleged that VPI had continued to file improper tax returns for tax years through 2005. It was apparent from these allegations, and consistent with them, that Anderson could amend his pleading to expressly allege that VPI was negligent in that it prepared improper tax returns and financial statements in the period after September 5, 2004.

We accordingly conclude that the trial court abused its discretion in sustaining the demurrer to the negligence cause of action without permitting leave to amend.¹⁰

b. *The Causes of Action for Violation of Civil Code Section 52.1 and Intentional Infliction of Emotional Distress*

We next consider whether the two-year statute of limitations bars the causes of action for intentional infliction of emotional distress and violation of Civil Code section 52.1. As we will explain, we conclude that because those causes of action are based on the Cease and Desist Stipulation, the suspension of Anderson's membership and the imposition of the lien, and all of those events happened more than two years before this action was filed in September 2006, the causes of action are barred by the statute of limitations.

¹⁰ Aside from addressing the reasonable probability that an amended negligence cause of action, as described herein, would survive a statute of limitations challenge, we express no view on the viability of such a cause of action. VPI will be free to challenge any amended complaint through a subsequent demurrer.

The cause of action for intentional infliction of emotional distress alleges that VPI engaged in outrageous conduct that caused emotional distress to Anderson when it suspended his membership, imposed the lien, and required Anderson to sign the Cease and Desist Stipulation. According to the first amended complaint, Anderson signed the Cease and Desist Stipulation in 2001, his membership was suspended in 2002, and the lien was placed on his membership in 2003. Because all of these events occurred more than two years before September 2006, the cause of action for intentional infliction of emotional distress is time-barred, and the demurrer was properly sustained without leave to amend.

Anderson's cause of action for violation of Civil Code section 52.1 was based on VPI's alleged infringement of Anderson's right to free speech, his right to petition the government for redress of grievances and his "right to vote." Anderson claims that these wrongs occurred when he was required to sign the Cease and Desist Stipulation and when his membership was suspended. As we have explained, both of those events occurred more than two years before September 2006. Accordingly, Anderson's cause of action for violation of Civil Code section 52.1 is also time-barred, and the demurrer was properly sustained without leave to amend.

D. *The Demurrer to the Causes of Action for Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing*

Anderson also challenges the trial court's order sustaining VPI's demurrer to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing.

1. *The Second Amended Complaint Adequately Pleads the Relevant Terms of the Contract*

The trial court sustained the demurrer to those causes of action on the ground that the second amended complaint did not plead the relevant and essential terms of the contract that Anderson claimed was breached.

As we have explained, Anderson attached only three pages of the Rental Agreement to the second amended complaint, and he admitted in the second amended complaint that he "does not know the exact details of what is contained" in the missing pages.¹¹

However, Anderson alleged in the second amended complaint that the portion of the Rental Agreement that was breached was contained within the three pages that he had attached. Anderson stated that he had "fully attached the portions of the Rental Agreement which have been allegedly breached." He alleged that "[t]he pages of the Rental Agreement that have been attached . . . show a contractual relationship between [Anderson] and . . . VPI. The first page shows that [Anderson] is entitled to a certificate of membership in VPI" Anderson contended that VPI had breached the alleged provision entitling him to a certificate of membership in VPI because "[d]espite a contractual entitlement to full VPI membership including the right to vote, [Anderson's]

¹¹ Anderson stated in his reply brief to the demurrer in the trial court that he served a discovery request on VPI to obtain a complete copy of the Rental Agreement, but VPI also possesses only the same three pages of the agreement.

right to vote was suspended without any lawful justification[,]" and VPI placed a lien on his membership.

A contract may be alleged by setting it out verbatim in the complaint, attaching it to the complaint, or alleging the substance of its relevant terms. (See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, §§ 479, 480, pp. 572-573.) We conclude, contrary to the trial court's decision, that these statements in the second amended complaint sufficiently plead the relevant terms of the contract. Anderson has both attached what he contends is the relevant portion of the Rental Agreement and has alleged the substance of its relevant terms by stating that the first page contains a provision entitling him to membership.

2. *The Second Amended Complaint Does Not State Facts Sufficient to Constitute a Cause of Action for Breach of Contract*

Although we conclude that Anderson has sufficiently pled the relevant terms of the contract, we conclude — as we will explain — that the cause of action for breach of contract is nevertheless subject to demurrer on the ground cited by VPI, namely that it fails to state facts sufficient to constitute a cause of action.

The second amended complaint alleges that the first page of the Rental Agreement provides that Anderson is entitled to membership in VPI, and VPI breached that contractual provision. We have reviewed the first page of the Rental Agreement and have found no such provision. The first page of the agreement contains a recital in its first paragraph that Anderson "is the owner of a Certificate of Membership in [VPI]." However, it is clear from the substance of the Rental Agreement that it does not concern

the terms under which Anderson is entitled to continue to hold his membership interest. Instead, the first page of the Rental Agreement sets out the terms under which Anderson will be permitted a tenancy in the mobilehome park, including identifying the specific space he is to occupy and his monthly fees.

The other two pages of the Rental Agreement attached to the second amended complaint also do not contain provisions concerning Anderson's alleged entitlement to a membership interest. One page consists mainly of standard contractual terms such as "time is of the essence," "gender," an attorney fees clause, acknowledgements, and a severability provision. The final page contains Anderson's signature under the statement that he has read and agreed to comply with VPI's rules and regulations.

As we have explained, Anderson alleges that VPI breached the Rental Agreement when it suspended his membership and placed a lien on it. Based on our review of the Rental Agreement, we conclude that the pages attached to the second amended complaint do not contain an agreement concerning the conditions under which Anderson is entitled to maintain his membership in VPI or under which VPI may place a lien upon Anderson's

membership.¹² Accordingly, the second amended complaint does not state a cause of action for breach of contract.¹³

3. *The Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing Does Not State Facts Sufficient to Constitute a Cause of Action*

The cause of action for breach of the covenant of good faith and fair dealing similarly fails to state a cause of action because it relies on the same deficient allegations as the cause of action for breach of contract. (Cf. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 352 [in the employment context, although a breach of the contract may also constitute a breach of the implied covenant of good faith and fair dealing "a claim that merely realleges [a breach of contract] as a violation of the covenant is superfluous"].) Specifically, although the second amended complaint pleads that the Rental Agreement and the Certificate of Membership contain an "implied covenant" entitling Anderson to a

¹² Anderson has also attached his Certificate of Membership to the second amended complaint and has alleged that it forms part of the parties' contractual relationship. However, the Certificate of Membership is merely a one-page document certifying Anderson's ownership of a membership as of October 1994, and it does not set forth the terms of any agreement between the parties.

¹³ In his appellate brief, Anderson focuses on another breach of contract theory that is mentioned in one paragraph in the second amended complaint's breach of contract cause of action. The second amended complaint states: "Defendants have also tried on several occasions to unilaterally change the terms of the original Rental Agreement with [Anderson] and with other VPI members. However, [Anderson]'s refusal to sign any new agreement has prevented Defendants to unilaterally change the terms of the original Agreement with respect to Plaintiff." This allegation does not state a cause of action for breach of contract because it does not identify any provision of any contract allegedly breached by VPI and does not identify any damage suffered by Anderson.

membership interest, the second amended complaint identifies no contractual language to support that claim.

E. *Award of Attorney Fees*

Anderson states in his appellate brief that "[a]fter this appeal had been perfected the court awarded attorneys fees of \$16,000 to defendant." He requests that we reverse the award of attorney fees.

The appellate record does not contain any filings or rulings concerning the award of attorney fees to VPI. Further, Anderson did not file a notice of appeal from any post-trial order awarding attorney fees. Accordingly, the issue of whether the trial court erred in granting attorney fees to VPI is not properly before us. "A postjudgment order which awards or denies costs or attorney's fees is separately appealable[,] and if no appeal is taken from such an order, the appellate court has no jurisdiction to review it." (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, citations omitted.)

DISPOSITION

The trial court's ruling denying Anderson leave to amend the negligence cause of action in the first amended complaint in this action is reversed. This action is remanded to the trial court for proceedings consistent with this opinion. In all other respects the judgment is affirmed. The parties are to bear their own costs.

IRION, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.